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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. _____

OSCAR E. HYDE,
Petitioner,
vs.
UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The petitioner, Oscar E. Hyde, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit rendered in the proceedings on June 23, 1971.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, as yet unreported, appears as Appendix A to this petition. The said Court of Appeals denied petitioner's petition for rehearing on October 7, 1971. The order denying the petition for rehearing appears as Appendix B to this petition. The opinion and judgment of the said Court of Appeals affirmed the judgment of the United States District Court for the Northern District of Alabama.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 23, 1971. A timely petition for rehearing was filed and was denied by said Court of Appeals on October 7, 1971. This petition for writ of certiorari is to review the judgment of the said Court of Appeals in a criminal case and is filed less than thirty days after the order of the said Court of Appeals denying said petition for rehearing. The jurisdiction of this Court is involved under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The petitioner was tried and convicted in the United States District Court for the Northern District of Alabama of violating 18 U.S.C. Section 1951. The questions presented are:

1. Whether the petitioner's Sixth Amendment right to a trial by jury was impermissibly infringed by government counsel's statements to the effect that it was the trial court's prerogative to find that interstate commerce existed or was affected, the rulings of the trial court on such statements, and the court's oral charge on this subject.

2. Whether the petitioner's Fifth Amendment right to a fair trial or his Sixth Amendment right to a trial by an impartial jury was impermissibly infringed by the fact of massive publicity in the course of trial and the refusal of the trial court to sequester the jury or to take other effective steps to avoid prejudice.

3. Whether petitioner's constitutional rights under the Fifth and Sixth Amendments, or his rights under the Jury Selection and Service Act of 1968 were violated in the manner of selection of the grand jury or the petit jury venire.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . , nor be deprived of life, liberty, or property, without due process of law . . ."

Constitution of the United States, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . ."

United States Code, Title 18, Section 1951:

> "§1951. Interference with commerce by threats or violence
>
> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or prop-

erty in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, or fear, or under color of official right.

(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45."

The Jury Selection and Service Act of 1968, United States Code, Title 28, Sections 1861-69, because of its length, is reproduced as Appendix C to this petition.

STATEMENT OF THE CASE

Petitioner was jointly indicted with Richmond M. Flowers, Joe Breck Gantt and James C. Kelly in a four count indictment. Two counts charged conspiracies to violate 18 U.S.C., Section 1951, and two counts charged substantive violations of the same section. Each count related to alleged extortions by the defendants, with two counts involving intrastate securities issues and two involving loan company operations. Illness of defendant Kelly caused a severance as to him. The remaining defendants were convicted.

Prior to trial petitioner and his co-defendants moved the court to sequester the jury in anticipation of the massive publicity that would be accorded the trial of a former Alabama Attorney General—Securities Commissioner, and petitioner, a prominent businessman. The United States Attorney expressed a desire for sequestration. The motion for sequestration was denied, and the unsequestered jury daily was exposed to a deluge of headlines and articles considered by petitioner to be highly prejudicial in nature. The trial lasted five weeks. The newspaper articles were regularly called to the attention of the court and numerous mistrial motions were made. The court gave the jury general admonitions regularly against reading the newspapers and questioned the jurors collectively concerning their exposure to prejudicial materials. No other protective action was taken.

Petitioner is undertaking to cause to be certified to this court that portion of the record below containing those exhibits filed in connection with his motions for mistrial based upon the adverse newspaper publicity. Although there are many others, some of the offending headlines read as follows: "Official testifies he paid $25,000, got

fast action", "For stock issue approval—witness testifies he made fat payoff", "Flowers 'profit' pact is cited", "Paid $59,438—witness says Hyde got lending injunction lifted", "Prosecution busy tying loose ends", "Loan exec tells of $4,600 shakedown to avoid trouble", "Hyde set up PR contract, witness says", "Exec quotes Flowers: 'Whatever Hyde says is the way it will be' ", "His man Friday testifies—Flowers was a busy, busy man", "Witness says—Hyde firms got money", "Gilchrist testimony—Hyde linked with 'Extort Try' on Space City USA", "Hyde had 'big' investment in Flowers, Ex-Senator says", "Flowers defense has work cut out", and "Mystery document pops up in trial; may not be admitted".

Subsequent to indictment and prior to trial, petitioner and his co-defendants sought a dismissal of the indictment on the ground that the grand jury which returned it was composed through use of an impermissible "key man" system. The affidavit of the clerk of the United States District Court for the Northern District of Alabama is included in this petition as Appendix D, and certain exhibits amplifying the method of selection are attached thereto. Prior to trial, petitioner and his co-defendants challenged the petit jury venire on the ground that it was not selected pursuant to a plan harmonious with the requirements of the Jury Selection and Service Act of 1968, United States Code, Title 28, Sections 1861-69. The plan adopted by the United States District Court for the Northern District of Alabama is included in this petition as Appendix E. The objections to the petit jury venire were overruled by the trial court without a hearing on the premise that the plan utilized had been approved in the manner specified in the Act. The thrust of the objections made to the plan was that it limited juror selection to the lists of registered voters from those counties comprising the Northern District of Alabama, and that this method of selection patently

would not produce the requisite cross-section of the adult population.

The final contention of petitioner is that government counsel and the trial court misapprehended the function of the jury as the triers of the fact in a case of this type. In his opening statement, the Assistant United States Attorney flatly advised the jurors, over defense objection, that it was the province of the court and not that of the jury to ascertain that interstate commerce existed and that the acts of the defendants affected, impeded or delayed that commerce. The trial court concurred in these statements by overruling objections. At the conclusion of the trial, the court delivered an oral charge to the jury which petitioner contends had the effect of instructing the jury that the court had found that the evidence met the requirements of United States Code, Title 18, Section 1951 concerning the existence of interstate commerce and any required effect on interstate commerce, leaving the jury to ascertain under the conspiracy counts of the indictment, for example, only the existence of the conspiracy charged and the commission of an overt act in pursuance thereof. These and other portions of the oral charge are set forth in the dissenting opinion of Judge Rives, included in this petition as Appendix A. At the conclusion of the oral charge, defense counsel pointed out to the court that the effect of its instruction in this particular was to lead the jury to believe that it had no option but to accept the court's finding as to the adequacy and veracity of the evidence on this point, and to conclude that they would have no right to reject such evidence, even if they disbelieved it. The trial court made no correction of its oral charge.

REASONS FOR GRANTING WRIT

1. The decision of the Court of Appeals for the Fifth Circuit approving the oral charge of the trial court regarding the respective functions of the court and the jury with reference to the evidence concerning interference with interstate commerce by petitioner and his co-defendants is believed to be contrary to the decisions of this Court in *Bollenbach* v. *United States*, 326 U.S. 607 (1946) and in *Sparf and Hansen* v. *United States*, 156 U.S. 51 (1895). The decision also is in conflict with prior decisions of the United States Court of Appeals for the Fifth Circuit in such cases as *United States* v. *Skinner*, 437 F.2d 164 (5th Cir. 1971); *Mims* v. *United States*, 375 F.2d 135 (5th Cir. 1967); *Edwards* v. *United States*, 286 F.2d 681 (5th Cir. 1960); and *Roe* v. *United States*, 287 F.2d 435 (5th Cir. 1961), cert. denied 368 U.S. 824.

The dissenting opinion of Judge Rives demonstrates more eloquently than petitioner is able that the oral instruction in this case destroyed petitioner's right to trial by jury by withdrawing from the consideration of the jury two of the material elements of the charge against petitioner, declaring to the jurors that these elements had been found by the court to exist "as a matter of law".

The jurors were faced at the outset with a series of opening statement remarks by government counsel, all of which were allowed by the court to stand over defense objection, eliminating the jury role in a part of the fact finding process. The following is one such remark:

> "In spite of what counsel told you, you might be vitally concerned with all the facts in the case, you need not concern yourself with commerce, interstate commerce affected, impeded, or obstructed."

The last words heard by the jurors, of course, were included in the court's oral charge. These were as erroneous as the words of government counsel. One example follows:

> "I instruct you that if you find from the evidence, beyond a reasonable doubt, that a conspiracy existed as charged in Count One or in Count Two or in both Counts One and Two of the indictment, and that one of the overt acts charged in each count was committed, that the Court has found, as a matter of law, that the requirements of the Hobbs Act under Section 1951 of Title 18 of the United States Code have been met as to interstate commerce being affected."

As Judge Rives remarks in his dissent, the prediction of the United States Attorney that the court would instruct that it was the court's function to determine whether or not interstate commerce had been established and affected, impeded, or obstructed "turned out to be a true prophecy."

The prior rule of law in the Fifth Circuit concerning the inviolability of the right to trial by jury had been as stated by that court in *Roe* v. *United States*, 287 F.2d 435, 440 (5th Cir. 1961):

> ". . . no fact, not even an undisputed fact, may be determined by the Judge. The plea of not guilty puts all in issue, even the most patent truths."

To remove from the consideration of the jury any material element of the offense charged is to grant to the prosecution a partial directed verdict of guilt, and that as effectively deprives the defendant of the right to trial by jury as if the court should direct the jury to return a finding of guilt. *Mims* v. *United States*, 375 F.2d 135 (5th Cir. 1967); *Edwards* v. *United States*, 286 F.2d 681 (5th Cir. 1960). In *Roe*, the Court of Appeals for the Fifth Circuit further made the point that where objections state

with precision and clarity a complaint that the charge amounts to a partial direction of a verdict of guilt and a failure to submit a crucial issue to the jury, the court is obliged to take corrective steps in order that the jury may clearly understand the issues that it has for decision. A failure to take such action is substantial and harmful error. In the instant case, counsel for petitioner complained to the court at the conclusion of its charge that it would eliminate from the mind of the jury that they possessed the prerogative, "if they do not believe the evidence" relative to the existence of commerce or any effect on commerce, to reject that evidence. The explicit objection was made that the court had found "as a matter of law, that interstate commerce had been affected."

Judge Rives' dissent makes it convincingly clear that the casual insertion by the trial judge of the words "if believed" from time to time, when considered in context, could not have conveyed to the jury that the belief beyond a reasonable doubt of its members on the issues relating to commerce was of any importance in the result. A constituent element of the offense charged was effectively and completely removed from their consideration.

The abundance of evidence of guilt, where it exists, is not the test. *Bollenbach* v. *United States*, 326 U.S. 607 (1946), is explicit that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury in recognition of the constitutional right to trial of the facts at the hands of a jury. The belief of judges in the guilt of an accused or in the proof of a material element necessary to establish that guilt, however justifiably engendered by the record, is not to be substituted for ascertainment of guilt by a jury under appropriate judicial guidance. The action of the trial court and the decision of the United States Court of Appeals for the Fifth Circuit do violence to this rule.

Those portions of the court's oral charge dealing with this issue, and with the jury as triers of fact generally, as well as the defense objection to the charge, are set forth in Judge Rives' dissent in Appendix A, at Pages A78-A80, A83-A84 and A85-A86 of the opinion below.

2. The decision of the Court of Appeals for the Fifth Circuit upheld a method of selection of the Grand Jury which is constitutionally and statutorily impermissible, and approved a method of selection of the venire which probably fails to satisfy the requirements of the Sixth Amendment to the Constitution of the United States or the Jury Selection and Service Act of 1968, United States Code, Title 28, Sections 1861-1869.

Petitioner and his co-defendants challenged the formation of the Grand Jury which returned the indictment in this case by motions to dismiss the indictment, and challenged the petit jury by motions challenging the array and seeking to quash the venire.

The indictment in this case was returned prior to the effective date of the Jury Selection and Service Act of 1968, pursuant to a system of "key man" selection which petitioner contends is patently repugnant to the requirements of the statutory predecessor of the 1968 Act, and to the spirit of the Fifth Amendment right to indictment by the grand jury. Former Section 1861, Title 28, United States Code declared that any American citizen who had attained the age of twenty-one years and who had resided for one year within the judicial district, was competent to serve as a grand or petit juror unless previously convicted of certain crimes, illiterate, or mentally or physically infirm. Far from establishing a system of juror selection that would give all those qualified at least an opportunity to serve, the plan for the Northern District of Alabama prior to the effective date of the Jury Selection

and Service Act of 1968 embellished a "key man" system with a direction to those key men to "select only such men and women as you would want to pass on a case involving your life, liberty or property". Service on the jury, grand or petit, obviously was voluntary rather than compulsory, since only two-thirds of those persons who were suggested by the key men even responded to the questionnaire sent them by the Jury Commissioner, and no action was taken to bring them into jury service. Approximately sixty percent of those who did reply ultimately had their names placed in the box. Finally, when the allocation to the various counties in the district was determined, the Jury Commissioner stated that the number of allocated jurors was divided into "four categories of farmers, merchants, bankers and others", apparently in accord with some census percentage base. These matters very clearly appear in Appendix D.

The Court of Appeals for the Fifth Circuit struck down just such a plan in *Rabinowitz* v. *United States,* 366 F.2d 34 (5th Cir. 1966). The decision recognizes that there is a constitutional duty to develop a system that will probably result in a fair cross-section of the community being placed on the jury rolls. More important here is the fact that the penalty imposed in that case for failure to devise such a system was not only that a conviction by a jury chosen through such an unconstitutional plan was reversed, but that the indictment returned by a grand jury similarly selected was dismissed.

The plan of the United States District Court for the Northern District of Alabama for random selection of grand and petit juries, inaugurated subsequent to the effective date of the Jury Selection and Service Act of 1968, is found at Appendix E. While this plan does make the voting list the basis for the plan, it fails to prescribe any other source of names in addition thereto in order to guarantee

that the policy established by this remedial legislation is met, or that discrimination based on race, color, sex or economic status is eliminated. The trial court summarily overruled attacks on the petit jury venire, apparently on the ground that the plan for the Northern District of Alabama had been approved in the manner specified in the statute.

We consider that the methods of grand jury and petit jury selection in this case are offensive to the principles laid down in such decisions of this Court as *Glasser* v. *United States*, 315 U.S. 60 (1942); *Strauder* v. *West Virginia*, 100 U.S. 303 (1880); and *Ballard* v. *United States*, 329 U.S. 187 (1946).

3. By its decision, the Court of Appeals has upheld the trial court in its refusal to take adequate steps to protect petitioner from the effect of prejudicial publicity in the course of trial, and has thus so far sanctioned a departure by the trial court from the proper course of judicial proceedings as to call for an exercise of this Court's power of supervision. The decision is believed to conflict with pronouncements of this court in such cases as *Marshall* v. *United States*, 360 U.S. 310 (1959); *Irvin* v. *Dowd*, 366 U.S. 717 (1961); and *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966). The decision also is believed to conflict with the decisions of other courts of appeal on some of the same matters raised as part of this issue. *United States* v. *Palermo*, 410 F.2d 468 (7th Cir. 1969); *Margoles* v. *United States*, 407 F.2d 727 (7th Cir. 1969); *Silverthorne* v. *United States*, 400 F.2d 627 (9th Cir. 1968); *Briggs* v. *United States*, 221 F.2d 636 (6th Cir. 1955).

This case generated much pre-trial publicity, prompting defense counsel to move at the outset for sequestration of the jury. Prosecution counsel expressed a concurrence with this motion, but the court denied it. Once the trial was underway, a daily storm of newspaper headlines and

lengthy articles descended. Evidence taken in connection with the various motions for mistrial reflects that the final edition of the Birmingham News, whose coverage was shown to saturate the Northern District of Alabama, was on the streets and awaiting the unsequestered jurors as they daily departed the confines of the court house. The articles were regularly called to the attention of the court, and frequent motions for mistrial were made. No action was taken except the repeated admonition that jurors were not to read these articles. On one occasion, the court examined the jurors collectively to ascertain whether they had been exposed to any materials which had prejudiced them. No other corrective action was taken.

The majority opinion of the Court of Appeals indicates that it was troubled by the procedure adopted. It acknowledges that the trial court's admonition to the jurors was not as understandable as the language suggested by the American Bar Association Project on Minimum Standards for Criminal Justice, "Standards Relating to Fair Trial and Free Press". It finds as "more troublesome" the fact that the court at one point describes as "facetious" counsel's suggestion that interrogation of the jurors about exposure to news stories should come from him, and acknowledges that this would have been the preferable practice. It is further concerned with the fact that, at the conclusion of the evidence, the court inquired of the jury "as a whole" if any juror had received any prejudicial publicity that would prevent him from impartially deciding the case on the basis of the evidence. The opinion acknowledges that the Court of Appeals for the Fifth Circuit has determined that it is for the court and not for the jurors themselves to determine whether their impartiality has been destroyed by any prejudicial publicity to which they have been exposed. It acknowledges that the inquiry should have been whether the jurors had, in fact, received

any information, and the court should make its independent determination whether impartiality had been destroyed. The opinion also agrees that the preferable practice is to conduct individual questioning of the jurors on this subject. The Court of Appeals dispenses with all of these worrisome items by finding that the newspaper articles were not prejudicial.

Petitioner requests that this Court review the headlines and articles in question. It is contended that the bold captions themselves transmit a lethal, prejudicial message. The two hundred word per minute reader consumes an eight word headline in only 2.4 seconds. Before he realizes it, the juror not only has violated the court's admonition not to read, but he has had impressed upon his mind the most potent possible summary of the prosecution's message, devoid of the effect of contradictions and cross-examination points. Further, his objectivity is impaired by the vision of an overriding public interest, not alone in the case itself, but in conviction.

In *Sheppard* v. *Maxwell,* 384 U.S. 333, 363 (1966), this Court recognized sequestration as a sometimes necessary and always effective step. Moreover, it is not a step to be taken only on motion of counsel, but it should be done sua sponte by the court where circumstances appear to require it.

The trial court having taken no effective action, it was not incumbent on petitioner to demonstrate that prejudice had, in fact, occurred; neither did he bear the burden of overcoming any juror's statement that he would not be, or had not been, affected by prejudicial publicity. *Marshall* v. *United States,* 360 U.S. 310 (1959).

While petitioner is of the opinion that many of the headlines in the instant case were at least as damaging as those denounced in *Silverthorne* v. *United States,* 400

F.2d 627 (9th Cir. 1968), he considers that the rule of *Sheppard* v. *Maxwell*, supra, dictates that he is not required, in the face of massive and pervasive publicity, to demonstrate any essential unfairness. Certainly, he is not required to demonstrate actual prejudice as a prerequisite to reversal. *Estes* v. *Texas*, 381 U.S. 532 (1965).

Having failed to grant the motion for sequestration, the trial court should have taken other steps which were demonstrably effective to eliminate a presumption of prejudice. Finally, it should have granted the various motions for mistrial. Since it failed in this, the Court of Appeals should have reversed.

CONCLUSION

Petitioner Hyde and his co-defendants, Richmond M. Flowers and Joe Breck Gantt, are filing their separate petitions for certiorari, with a joint appendix. If permissible under the rules of this Court, petitioner Hyde adopts the contents of the petitions filed by other petitioners.

For the reasons set forth herein, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

CERTIFICATE OF SERVICE

I certify that I have served copies of the foregoing Petition for Writ of Certiorari and Appendix to the Petition on the Honorable Wayman G. Sherrer, United States Attorney for the Northern District of Alabama, on The Solicitor General, United States Department of Justice, on Honorable Charles Morgan, Attorney for Petitioner Joe Breck Gantt, and on Hon. James M. Fullan, Jr., Attorney for Petitioner Richmond M. Flowers, by mailing same to each of them in the United States mail, properly addressed and with first class postage prepaid, the 1st day of November, 1971.

L. DREW REDDEN
Of Counsel for Petitioner